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FEB 09 2018

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Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION**

In re:

Janet Nabwanda Wagabaza,

Debtor(s),

JANET NABWANDA WAGABAZA,

Plaintiff,

v.

R. ERIC BEVERIDGE AND SPECIAL DEFAULT
SERVICES, INC.,

Defendants.

Case No.: 6:07-bk-17151-MJ

Adversary No.: 6:17-ap-01117-MJ

Chapter: 7

**MEMORANDUM OF DECISION RE PRELIMINARY
INJUNCTION; SUMMARY JUDGMENT; MOTION
FOR ABSTENTION; MOTION RE SUBJECT
MATTER JURISDICTION; AND OSC RE
CONTEMPT**

Hearing Dates: Various

Location: Courtroom 301
3420 Twelfth Street
Riverside, CA 92501

INTRODUCTION

The mantra of bankruptcy relief in this country is that it provides
a fresh start for the honest but unfortunate debtor who has fallen on

1 hard financial times. The bankruptcy discharge rids a debtor of debt so
2 she has the opportunity to earn sufficient income to live comfortably and
3 again acquire property without the consequence of prior debts. This case
4 tests that fresh start for a debtor who lost ownership of her personal
5 residence through a nonjudicial foreclosure at the same time she filed
6 bankruptcy and received a chapter 7 discharge of her debt. Through the
7 good graces of her sister, who bought the house from the foreclosing
8 lender, she was able to continue residing in the house until seven years
9 later she could reacquire title by qualifying for her own mortgage.

10 But her fresh start was thwarted by a foreclosed-out junior trust
11 deed holder which claimed that under California Civil Code § 2930 (§
12 2930) it had a legal right to reimpose its trust deed on the residence
13 when the debtor reacquired it. California law, however, does not
14 contemplate the consequence when the debt underlying the trust deed has
15 been discharged before it is reimposed, nor does it consider the effect
16 of the provision in the Bankruptcy Code that property acquired by a
17 debtor after the petition date may not be subjected to a lien based on a
18 prepetition security agreement. In a case of first impression, this
19 Memorandum of Decision addresses those issues.

20 This court has made a series of rulings in favor of debtor Janet
21 Wagabaza (Debtor) in her controversy with Eric Beveridge, Trustee of the
22 R. Eric Beveridge Separate Property Trust Dated February 12, 1999
23 (Beveridge). These rulings answer the question described above: whether
24 a junior lien holder on the residential property of Debtor, whose
25 security interest was extinguished by a nonjudicial foreclosure conducted
26 by a senior trust deed holder, may revive that security interest after
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1 the underlying debt was discharged in a chapter 7 bankruptcy and then
2 Debtor reacquires title to the home seven years later. As fully
3 explained below, this court has ruled that Beveridge may not revive the
4 lien after the underlying debt was discharged. Additionally, § 552(a)¹
5 prevents Beveridge from imposing a lien on real property acquired by
6 Debtor after the bankruptcy petition date based on its extinguished
7 prepetition deed of trust.

8 Based on these legal principles the court first issued a temporary
9 restraining order and preliminary injunction to prevent Beveridge from
10 pursuing an unlawful detainer proceeding after it purportedly foreclosed
11 upon its junior lien. The court then denied motions by Beveridge to
12 abstain from the proceeding and to dismiss for lack of subject matter
13 jurisdiction. Finally, the court granted summary judgment for Debtor,
14 quieting title to the subject property in Debtor, free of the Beveridge
15 lien.

16 This Memorandum of Decision explains the court's reasoning in
17 making these rulings and shall serve as the court's findings of fact and
18 conclusions of law to the extent such are required under the provisions
19 of Civil Rule 52(a), as made applicable in the bankruptcy court by Rule
20 7052.

21 **FACTUAL AND PROCEDURAL BACKGROUND**

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25 ¹ Unless otherwise indicated, all chapter and section references
26 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. "Rule" references are
to the Federal Rules of Bankruptcy Procedure and "Civil Rule" references
are to the Federal rules of Civil Procedure.

1 The facts are largely undisputed. On November 6, 2007, Debtor
2 filed a chapter 7 bankruptcy proceeding in this court. In her Schedule A
3 she listed an ownership interest in real property located at 9300
4 Nickellaus Court, Corona, CA 92883 (the Property) which was her personal
5 residence. Her Schedule D listed two liens on the Property, a first
6 trust deed held by Saxon Mortgage Services, as loan servicer for Wells
7 Fargo Bank, trustee, (Wells Fargo trust deed) recorded on June 24, 2004,
8 and a second trust deed recorded on October 31, 2006, held by Beveridge
9 and serviced by Unified Mortgage Service (the Trust Deed).² On December
10 27, 2007, Saxon/Wells Fargo filed a motion for relief from the automatic
11 stay, alleging a default in payments by Debtor and a lack of equity in
12 the property and seeking relief to complete a foreclosure on the
13 Property. Debtor did not oppose the motion, which was granted on January
14 22, 2008. On February 13, 2008, Wells Fargo conducted a nonjudicial
15 foreclosure sale on the Property and was the successful buyer based on a
16 credit bid. The Trustee's Deed Upon Sale was recorded on February 20,
17 2008, completing the foreclosure, which extinguished the second trust
18 deed held by Beveridge.

19 On February 23, 2008, Debtor received a standard discharge and her
20 case was closed on February 25, 2008. As a result of the discharge,
21 Debtor's personal liability to Beveridge was discharged. After that
22 date, Beveridge held no debt owed by Debtor and had no lien on any
23 property owned by Debtor.

24
25 ² The beneficiary on the second trust deed was initially Emvest
26 Mortgage Fund II, LLC which assigned the beneficial interest in the Trust
Deed to Beveridge on January 4, 2007.

1 On May 23, 2008, Debtor's sister Zipporah Wagabaza purchased the
2 Property from Wells Fargo, financing the purchase with a purchase money
3 deed of trust from Countrywide recorded on the same date. Zipporah was
4 the sole owner of the Property and the sole borrower from Countrywide,
5 but Debtor continued to live in the Property as her personal residence.
6 On April 15, 2015, Zipporah conveyed the Property to Debtor, subject to
7 the Countrywide deed of trust. On August 20, 2015, Debtor obtained a new
8 loan from ONY GLO, dba OGI Mortgage Bankers, which paid off the
9 Countrywide loan. Countrywide recorded a Full Reconveyance on September
10 9, 2015.

11 Asserting that the Trust Deed had revived under § 2930 when
12 Debtor reacquired title to the Property in 2015, Beveridge recorded a
13 Notice of Default and Election to Sell (NOD) on July 28, 2016, initiating
14 a nonjudicial foreclosure on the Property.³ In response, an attorney for
15 Debtor wrote Beveridge contesting the existence of the Trust Deed because
16 the Wells Fargo foreclosure extinguished it. Beveridge wrote back,
17 contending not only that the Trust Deed reattached when Debtor reacquired
18 title from her sister, but also asserting that the Beveridge lien was in
19 first position because of the refinance which took place subsequent to
20 the reacquisition, demoting the ONY GLO lien to second position.⁴ The
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22 ³ The record is devoid of facts about what happened between April
23 2015 and the Notice of Default, so whether Beveridge made a demand for
24 payment on the Trust Deed or gave other notice to Debtor that it
25 considered its trust deed reimposed on the property is unknown to the
26 court.

27 ⁴ The ONY GLO deed of trust was assigned to PennyMac Loan Services
28 LLC in February 2017. PennyMac contested Beveridge's superior lien
assertion in California state court and the issue was eventually resolved

1 second part of these assertions is not relevant to this court's ruling,
2 but the argument about the revived Trust Deed and the NOD placed
3 Debtor's Property in jeopardy. Subsequently, on November 1, 2016,
4 Beveridge recorded a Notice of Trustee's Sale against the Property.

5 On November 14, 2016, Debtor filed an action in the Superior Court
6 of California, County of Riverside, *Wagabaza v. Emvest Mortgage Fund II*
7 *LLC*, Case No. RIC 1615029 (State Court Action)⁵, stating causes of action
8 for violation of statutory exercise of power of sale, injunctive relief,
9 cancellation of instruments, and declaratory relief. All the causes of
10 action dealt only with the pending foreclosure proceeding, not the
11 validity of the lien rights. Debtor promptly moved for a temporary
12 restraining order (TRO) and hearing on a preliminary injunction. As far
13 as this court can ascertain, no bankruptcy-related arguments were made by
14 Debtor in the State Court Action. On November 23, 2016, the TRO was
15 granted, temporarily restraining the foreclosure sale, and a hearing on
16 the preliminary injunction was scheduled for December 16, 2016. The
17 preliminary injunction hearing was continued numerous times by
18 stipulations⁶ which also extended the effect of the TRO until it came on
19 for hearing on May 3, 2017, when it went off calendar, dissolving the
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22 between those two parties with Beveridge in the junior position. The
23 legal issues raised in that controversy are not pertinent to this court's
24 rulings.

24 ⁵ The State Court Action was amended on December 13, 2016, to name
25 Beveridge as the proper defendant rather than Emvest.

25 ⁶ There are no written stipulations on the docket, so they must
26 have been oral.

1 TRO.⁷ In the meantime, Beveridge answered and filed a cross complaint
2 with a sole cause of action for declaratory relief, asking the court to
3 declare that the foreclosure procedure was valid.

4 As a result of the TRO dissolving, on May 11, 2017, Beveridge
5 conducted a nonjudicial foreclosure sale of the Property and was the
6 successful bidder. A Trustee's Deed upon Sale was recorded on June 1,
7 2017, and on June 11, 2017, Beveridge served upon Debtor a 3-day notice
8 to quit. Debtor responded by filing a motion to reopen this bankruptcy
9 case, which was granted, and filed the relevant adversary proceeding
10 against Beveridge on June 15, 2017, seeking among other things an
11 injunction against the state court unlawful detainer proceeding. On June
12 26, 2017, after a noticed shortened time hearing, this court granted a
13 TRO restraining the prosecution of the unlawful detainer case and set a
14 hearing on the preliminary injunction on July 20, 2017. After a hotly
15 contested hearing on July 20,⁸ this court granted the preliminary
16 injunction (Preliminary Injunction), conditioned upon Debtor keeping the
17 first trust deed on the Property current.

18 Beveridge did not appeal the Preliminary Injunction, which is a
19 final appealable order under federal law. Instead, after answering the
20 complaint, it filed a Motion to Stay Action Under Mandatory Abstention,
21 asserting that the issues before this court were not core and were being
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23 ⁷ On April 24, 2017, the attorney for Debtor was allowed to
24 withdraw, so she proceeded thereafter pro se. Other than the withdrawal
25 of counsel, the state court docket does not reflect why Debtor stopped
26 pursuing the preliminary injunction.

27 ⁸ The substance of Beveridge's arguments is set forth in the Legal
28 Analysis section below.

1 addressed in the State Court Action. For reasons explained below, this
2 court denied the motion on October 19, 2017. Still not to be deterred,
3 Beveridge then filed a Motion to Dismiss for Lack of Subject Matter
4 Jurisdiction, asserting that because under Ninth Circuit law there was no
5 private claim for relief for contempt for violation of the discharge
6 injunction, there was no subject matter jurisdiction for the quiet title
7 adversary proceeding. Again this court denied the motion.

8 In the meantime, Debtor had filed a Motion for Summary Judgment and
9 a Motion for this court to issue an Order to Show Cause (OSC) for
10 Contempt based on violation of the discharge injunction. The OSC was
11 issued and both motions were set for hearing on January 4, 2018.
12 Beveridge's Cross Motion for Summary Judgment was set on the same day.
13 Debtor's Summary Judgment Motion was premised on § 552(a), arguing that
14 the Bankruptcy Code preempted state law on the issue of whether the Trust
15 Deed could be reimposed or revived on the Property when Debtor
16 reacquired it, i.e. that § 552(a) trumped § 2930, at least as applied
17 here. Beveridge defended with its panoply of arguments raised in the
18 other motions, including that Debtor had agreed to the reimposition in
19 the trust deed itself, that bankruptcy law did not preempt state law on
20 this primarily state law issue, that the court should abstain because the
21 matter was not core, that the doctrine of prior exclusive jurisdiction
22 required Debtor to litigate only in state court, and that the adversary
23 was the wrong procedure. The court gave an oral tentative ruling on the
24 record, granting summary judgment to Debtor, but submitted the matter for
25 final determination. This memorandum now makes that ruling final:
26 Summary Judgment for Debtor is granted. .

1 The OSC re contempt asserted two different theories: (1) that
2 Beveridge's request for entry of default against Debtor on its cross
3 complaint for declaratory relief in the State Court Action, which
4 included a request for an award of attorney's fees, was a violation of
5 the discharge injunction and (2) that all steps taken by Beveridge to
6 reimpose the Trust Deed, foreclose on the property, and attempt to evict
7 Debtor from the Property were contemptuous as a violation of the
8 discharge injunction. Beveridge defended by arguing that it could not
9 have knowingly violated the discharge injunction because it believed it
10 was rightfully enforcing its security interest which had passed through
11 the bankruptcy unphased and in full force and effect. After argument,
12 the court took the contempt action under submission. By this memorandum
13 it now stays its decision on (1), the request for entry of default, until
14 the outcome of the expected appeal of its other decisions and denies
15 contempt on (2), the broader violations based on enforcing the Trust Deed
16 because Beveridge could not have had the required subjective knowledge
17 that the discharge injunction applied to its enforcement of their alleged
18 security interest.

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20 **I. ANALYSIS of ADVERSARY PROCEEDING**

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22 **A. The Relief Sought**
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1 The adversary proceeding⁹ has five claims for relief, all turning
2 on the factual background described above: (1) Injunctive relief against
3 Beveridge's enforcement of its claims against the property, including in
4 particular prosecuting an unlawful detainer proceeding against the
5 Debtor; (2) declaratory relief, for a declaration that Beveridge had no
6 right to pursue a nonjudicial foreclosure against the Property because
7 its Trust Deed had been extinguished by the Wells Fargo foreclosure sale
8 and that the Notice of Default, the Notice of Trustee's Sale and the
9 Trustee's Deed Upon Sale were void; (3) determination of the extent,
10 priority and validity of the Beveridge Trust Deed such that the Trust
11 Deed was void and all instruments recorded as part of a nonjudicial
12 foreclosure under that Trust Deed were void; (4) for cancellation of
13 recorded instruments, including the Notices of Default and Trustee's Sale
14 and the Trustee's Deed Upon Sale; and (5) for wrongful foreclosure based
15 on the Trust Deed being extinguished by the Wells Fargo foreclosure sale
16 of the senior trust deed.

17 These claims for relief are similar in their factual and legal
18 predicate and from this court's perspective, a ruling for Debtor on any
19 one of them would compel a ruling for Debtor on the others.

20 **B. Debtor's Legal Arguments**

21 Beginning with her assertions in support of the application for TRO
22 and Preliminary Injunction, continuing in response to Beveridge's motions
23 and then in support of the Summary Judgment motion, Debtor has tendered
24

25 ⁹ The original complaint had four claims for relief. An amended
26 complaint was filed before Beveridge answered, asserting an additional
27 claim for relief for wrongful foreclosure.

1 alternate theories in support of the relief she has sought. First, she
2 argues that the Trust Deed was extinguished by the foreclosure of the
3 Wells Fargo trust deed and could not be reimposed years after the
4 underlying debt was discharged because there was no consideration for the
5 lien after discharge of the debt, an argument founded on the intersection
6 of California law, whereby the junior trust deed was extinguished, and
7 bankruptcy law, under which the discharge eliminated the consideration
8 for a security interest. In the alternative, she espouses that § 552(a)
9 commands that property acquired by Debtor post petition, including her
10 reacquisition of the Property, shall not be subject to a Beveridge lien
11 based on its prepetition security agreement, i.e. the extinguished Trust
12 Deed, a pure bankruptcy-based argument. Debtor contends that the
13 Bankruptcy Code preempts state law on that issue. Debtor has
14 additionally responded to Beveridge's subject matter jurisdiction,
15 abstention, and procedural arguments, as will be articulated during the
16 discussion of those issues below.

17 **C. Beveridge's Legal Arguments**

18 Beveridge initially relied on § 2930 and pre-1970 California cases
19 which were factually similar to this circumstance - i.e. a home owner had
20 been foreclosed upon by a senior lender, such foreclosure extinguished a
21 second trust deed, the home owner reacquired title shortly thereafter,
22 and these cases allowed the second trust deed creditor to revivify its
23 lien on the reacquired property under § 2930. In making this argument,
24 Beveridge also recited language in the Trust Deed by which Debtor granted
25 the security interest in perpetuity. It submitted that bankruptcy law
26 did not preempt state law, consistent with its argument that the issue
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1 before the court was one primarily of state law, not core bankruptcy law,
2 and that this court should abstain due to a lack of jurisdiction. It
3 further argued that § 552(a) did not apply to consensual liens on after-
4 acquired property but then, as noted below, reversed field and
5 characterized the new lien as involuntary, not consensual. In addition,
6 it asserted that its lien passed through the bankruptcy as an in rem
7 right and that the discharge injunction therefore had no effect on its
8 lien rights. It alternatively argued that the doctrine of prior
9 exclusive jurisdiction applied to deprive the bankruptcy court of
10 jurisdiction to rule on an in rem issue raised first in state court,
11 making federal abstention mandatory. And, finally, it contended that the
12 adversary proceeding was an improper remedy because the Ninth Circuit has
13 ruled that there is no private right of action for violation of the
14 discharge injunction, Debtor's remedy being solely a contempt action.
15 The court will address each of these defenses below.

16 **D. Summary Judgment**

17 A party may move for summary judgment where there "is no genuine
18 dispute as to any material fact and the movant is entitled to judgment as
19 a matter of law." Civil Rule 56(a) made applicable by Rule 7056.
20 Neither party here contends that any material facts are disputed;
21 therefore, this issue may appropriately be decided on summary judgment.¹⁰
22 However, if the court was not prepared to rule in favor of Debtor as a
23 matter of law, it would not grant Beveridge's counter motion. California
24

25 ¹⁰ The court will enter concurrently a Statement of Uncontroverted
26 Facts and Conclusions of Law in support of the Summary Judgment.
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1 cases make it clear that the application of § 2930 is based on a common
2 law equitable doctrine. *Hawkins v. Harlen*, 68 Cal. 236, 238, 9 P. 108
3 (1885) ("True, an after-acquired title by the mortgagor ordinarily inures
4 to the benefit of the mortgagee, but this is by operation of the doctrine
5 of relation, which is a fiction of the law adopted solely for the
6 purposes of justice, and will not be given effect when, as in the present
7 case, it would work manifest injustice."). Such application here would
8 raise disputed factual issues which could only be resolved after a trial.
9

10 **E. Jurisdiction**

11 Beveridge vigorously challenged this court's jurisdiction to
12 resolve this dispute on several grounds. Debtor and the court deflected
13 these challenges. The primary issue in this case concerns the effect of
14 the discharge injunction on the right of Beveridge to reimpose a lien
15 based on in rem rights after the in personam obligation to pay has been
16 terminated. As such, this matter is core as defined in 28 U.S.C. §
17 157(b) (2), subdivisions (I), "determinations as to the dischargeability
18 of particular debts"; (K) "determinations of the validity, extent, or
19 priority of liens"; and (O) "other proceedings affecting ... the
20 adjustment of the debtor-creditor ... relationship". The court further
21 relies on § 157(b) (3) which provides, "[A] determination that a
22 proceeding is not a core proceeding shall not be made solely on the basis
23 that its resolution may be affected by State law." These statutes accord
24 subject matter jurisdiction to the bankruptcy court.

25 Once the court has found the matter is core, as demonstrated below
26 the wind goes out of the prior exclusive jurisdiction and mandatory
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1 abstention arguments asserted by Beveridge. Finally, Beveridge's
2 argument that the court lacks subject matter jurisdiction over the
3 adversary because the sole remedy for a discharge violation is a
4 contested matter for contempt is not a jurisdictional challenge; it is a
5 procedural challenge to the remedy available for the violation of
6 substantive bankruptcy law. Determination of that proper remedy is also
7 core and falls within the exclusive jurisdiction of this court.

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10 **F. Effect of the Discharge Injunction**

11 Discharge of debt is the linchpin of the relief available to a
12 debtor in a bankruptcy proceeding. It is the key to the fresh start
13 promised to the honest but unfortunate debtor and, without it, bankruptcy
14 would offer little solace. As noted in Collier on Bankruptcy ¶ 1.02 (16th
15 ed. 2017), "The discharge is of singular importance to the individual in
16 a chapter 7, 11, 12, or 13" Discharge is not defined in the
17 Bankruptcy Code but has been variously defined in legal dictionaries as
18 "an order given by the bankruptcy judge...which forgives those remaining
19 debts which cannot be paid ..." (People's Law Dictionary) and "[t]he
20 release of a debtor from personal liability for prebankruptcy debts."
21 (Black's Law Dictionary, 10th ed. 2014). Although Debtor focused her
22 primary arguments in her Summary Judgment Motion on § 552(a), the court
23 starts with a more basic view of the impact of the § 524(a) discharge on
24 the issues before the court.

1 In the simplest terms, the chapter 7 discharge of the underlying
2 debt owed by Debtor to Beveridge¹¹ meant that at the time she reacquired
3 title to the Property in 2015, she owed no money and had no obligation to
4 Beveridge as consideration for a lien. It is long-settled California law
5 that a debt or obligation is a precursor to a lien. See, for example,
6 *Gostin v. State Farm Ins. Co.*, 224 Cal. App. 2d 319, 325, 36 Cal. Rptr.
7 596 (1964) (an attorney has no lien on litigation recovery where the
8 record did not demonstrate the obligation underlying the lien) and *East*
9 *Bay Municipal Utility District v. Garrison*, 191 Cal. 680, 692, 218 P. 43
10 (1923) (property tax does not become a lien on real property until the
11 tax is due to be paid). Without debt, there can be no lien. End of
12 story: Debtor wins.

13 Beveridge first argues that its lien passed through bankruptcy
14 unaffected by the administration of the case or the discharge. Such
15 argument would bear weight, as liens not avoided or modified in a
16 bankruptcy case do pass through unaffected - See, *Johnson v. Home State*
17 *Bank*, 501 U.S. 78, 82-83 (1991) - if the lien had not been extinguished
18 under California law. But it was: during the pendency of the chapter 7,
19 before Debtor's discharge, Wells Fargo completed its nonjudicial
20 foreclosure sale, an act which extinguished Beveridge's junior lien.
21 See, *Miller & Starr*, 5 Cal. Real Est. § 11:100 (3d ed.) ("A foreclosure
22 sale of a senior deed of trust eliminates the liens of junior lienors,
23

24 ¹¹ The note executed by Debtor at the time Beveridge's predecessor
25 Emvest loaned her \$25,000 in 2007 is not part of the record before the
26 court, but it is undisputed that Debtor owed that sum to Emvest at the
time the Trust Deed was recorded on January 4, 2007.

1 but the junior liens attach to any surplus sales proceeds that must be
2 paid to the junior lienors."); *Sumitomo Bank v. Davis*, 4 Cal. App. 1306,
3 1314, 89 P. 441 (1992). So, under the California law that Beveridge
4 relies on for all its arguments, it had no lien when the in personam
5 obligation was discharged. Again, looking at the hornbook California law
6 cited above, without an obligation there can be no lien. In such
7 setting, § 2930 has no bearing; a lien cannot attach where there is no
8 debt.

9 Beveridge looks to pre-1970 California cases for the principle that
10 the lien does revivify when a former owner of property reacquires title
11 after the original lien was foreclosed out, *Jensen v. Duke*, 71 Cal. App.
12 210, 234 P. 876 (1925) and *Barberi v. Rothchild*, 7 Cal. 2d 537, 539-541,
13 61 P.2d 760 (1936). Although both cases hold that § 2930,¹² which
14 codified the common law rule of after-acquired title, was applicable in
15 such circumstance where the obligor on the junior lien reacquired
16 title,¹³ neither case considers the impact of a modern day bankruptcy
17 discharge on such principle. An intervening bankruptcy was not in play in
18 *Jensen*, but *Barberi* notes in passing that between the time of the senior
19 foreclosure and the title reacquisition, the debtor filed a petition in
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21 ¹² Section 2930 provides "Title acquired by the mortgagor subsequent
22 to the execution of the mortgage, inures to the mortgagee as security for
23 the debt in like manner as if acquired before the execution." The
24 revival of junior deeds of trust is a corollary of the after-acquired
25 title doctrine in which a deed of trust given by a trustor will attach
26 to the property subject to the deed of trust when the trustor acquires
27 the property. See, *Tolman v. Smith*, 85 Cal. 280, 285-286, 24 P. 743
28 (1890).

¹³ *Jensen v. Duke* upheld the principle for the mortgagor and *Barberi*
v. Rothchild extended the holding to a trust deed holder.

1 bankruptcy and obtained his discharge. However, that case provides no
2 analysis of the impact of this fact on the lien reimposition which it
3 authorizes. Because of the change in the nature of the discharge
4 injunction between 1936 and the present time, to the extent that *Barberi*
5 implies the bankruptcy discharge makes no difference, it has been
6 overruled by statutory amendment.

7 Between 1800 and 1970, the federal bankruptcy discharge was merely
8 an affirmative defense that was waived if not timely asserted in
9 subsequent litigation. *Lone Star Security & Video, Inc. v. Gurrola (In re*
10 *Gurrola)*, 328 B.R. 158, 165 (9th Cir. BAP 2005). Creditors could
11 disregard the discharge and sue, hoping the defense was not timely
12 raised. *Id.* The purpose of the 1970 enactment of Bankruptcy Act § 14f
13 was to change the discharge from an affirmative defense to an absolute
14 defense. *Id.* Prior to its enactment, the discharge accorded under the
15 Bankruptcy Acts of 1800, 1841, 1867, and 1898 did not void debts or
16 judgments, but was entertained as a defense if raised by the debtor.
17 See, *Dimcock v. Revere Copper Co.*, 117 U.S. 559, 566 (1886). Thus, when
18 the Federal Rules of Civil Procedure were adopted in 1937, "discharge in
19 bankruptcy" was enumerated as an affirmative defense at Rule 8(c).¹⁴
20 Section 14f provided:

21 An order of discharge shall ---

- 22 (1) Declare than any judgment theretofore or
23 thereafter obtained in any other court is
24 null and void as a determination of the

25 ¹⁴ For an exhaustive discussion of the evolution of the discharge
26 and its present effect of voiding judgments and debt whether or not
27 raised affirmatively by a debtor, see *In re Gurrola*, 328 B.R. at 165-169.

1 personal liability of the bankrupt with
2 respect to any of the following: (a) debts
3 not excepted from the discharge under
4 subdivision a of section 17 of this Act; (b)
5 debts discharged under paragraph (2) of
6 subdivision c of section 17 of this Act; and
7 (c) debts determined to be discharged under
8 paragraph (3) of subdivision c of section 17
9 of this Act; and

6 (2) enjoin all creditors whose debts are
7 discharged from thereafter instituting or
8 continuing any action or employing any
9 process to collect such debts as personal
10 liabilities of the bankrupt.

9 The legislative history to the new statute made it abundantly clear
10 discharge was thereafter "self-executing" and there was no requirement
11 that the fact of bankruptcy protection be raised in state court. H.R.
12 REP. No. 91-1502 (1970), 1970 U.S.C.C.A.N. at 4156, quoted by 116 CONG.
13 REC. 34,818 (statement of Rep. Rogers); *In re Gurrola*, 328 B.R. at 167.
14 When the 1978 Bankruptcy Code was adopted, it incorporated the self-
15 executing provisions of § 14f in new § 524(a), expanding its breadth and
16 reemphasizing the voidness of prior judgments and obligations. The
17 defense of discharge in bankruptcy is now an absolute, nonwaivable
18 defense. *In re Gurrola*, 328 B.R. at 170. One can only speculate about
19 the reason the California Supreme Court in *Barberi* had nothing to say
20 about the bankruptcy discharge, but it seems logical to assume it was not
21 raised as a defense by the debtor and was therefore waived. Suffice it
22 to say that case can be no precedent for the effect of such discharge
23 today.

24 Beveridge also cites *Cortez v. American Wheel, Inc. (In re Cortez)*,
25 191 B.R. 174 (9th Cir. BAP 1995) to support its position that the Trust
26 Deed lien passed through the bankruptcy. In *Cortez*, the debtors executed
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1 a promissory note to American Wheel, secured by a deed of trust. For
2 unexplained reasons, the trust deed was not recorded. Debtors later
3 filed a chapter 7 case, listing American Wheel as an unsecured creditor.
4 Although the trust deed was avoidable by the trustee because it had not
5 been perfected, neither trustee nor debtors sought to avoid it while the
6 case was administered. After discharge and closing, American Wheel
7 recorded the trust deed and then filed an action to judicially foreclose
8 the lien. Debtors then sought to reopen the bankruptcy case so that they
9 could prevent American Wheel from foreclosing. The bankruptcy court
10 denied the reopen motion without stating its reasons and debtors
11 appealed. The BAP affirmed, finding that the valid but unperfected lien
12 which was not avoided during the bankruptcy had passed through the
13 bankruptcy unimpaired and was enforceable. The BAP did not need to
14 consider whether there was underlying debt to support the lien because it
15 had never been extinguished. Although a hypothetical lien creditor (i.e.
16 the trustee) could have avoided the trust deed based on the failure to
17 perfect it by recording, this had no effect on the security as between
18 the debtors and American Wheel. So American Wheel was entitled to
19 foreclose its lien.

20 That case is distinguishable from the facts here. Here, the Trust
21 Deed was extinguished by Wells Fargo's foreclosure during the bankruptcy
22 and therefore as a matter of state law could not pass through. Although
23 "silent" to the world because of its unrecorded status, as between the
24 debtors and American Wheel it was a valid lien, making the discharge of
25 the personal liability not pertinent to the ability to foreclose after
26 the case closed. Here, there was no longer a valid lien when the case
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1 closed. And there was no longer any personal liability to support a new
2 lien after the discharge.

3 Beveridge's lien was extinguished by Wells Fargo's foreclosure. No
4 lien passed through. The obligation to Beveridge was discharged in the
5 chapter 7. Without a debt there can be no lien. Title should be quieted
6 in Debtor absent any Beveridge Trust Deed. Any steps taken to enforce
7 the Trust Deed, including the nonjudicial foreclosure and eventual
8 unlawful detainer proceeding, are void. Section 524 specifies that the
9 discharge voids any preexisting judgment and case law holds that an act
10 in violation of the discharge injunction is void. *In re Gurrola*, 328
11 B.R. at 171. Since the existence of an obligation is necessary to
12 creation of a lien, by asserting that the Trust Deed encumbered the
13 Property when reacquired, Beveridge has asserted that the obligation to
14 pay must still exist. Such assertion is void under § 524 and everything
15 that flows therefrom is also void.

16 **G. Section 552(a) Preempts State Law**

17 Section 552(a) is a critical component of a debtor's fresh start
18 and provides that "property acquired by the estate or by the debtor after
19 the commencement of the case is not subject to any lien resulting from
20 any security agreement entered into by the debtor before the commencement
21 of the case." Thus, the plain language of the statute here states that
22 when Debtor regained title to the Property in 2015 it was not subject to
23 a new lien based on the Trust Deed executed in 2006. To the contrary,
24 however, § 2930 compels an opposite result (overlooking for the moment
25 that the underlying obligation was discharged). Under its provisions and
26 the older California cases cited above, when Debtor reacquired the
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1 Property from her sister, it was after-acquired property that was subject
2 anew to Beveridge's security interest which was extinguished in 2008 by
3 the Wells Fargo foreclosure. These two statutes cannot coexist, as the
4 outcomes under the current facts are in direct conflict with each other.
5 Therefore, this court holds that the Bankruptcy Code preempts state law,
6 meaning the Trust Deed may not reattach.

7 Under the Supremacy Clause, U.S. Const. Art. VI, cl.2, state law is
8 preempted by federal law in three circumstances: (i) express preemption,
9 (ii) field preemption, and (iii) conflict preemption. *English v. General*
10 *Elec. Co.*, 496 U.S. 72, 78-79 (1990). Article 1, Section 8 of the
11 Constitution empowers Congress to establish uniform laws on the subject
12 of bankruptcy throughout the United States. State laws, "to the extent
13 that they conflict with the law of Congress, enacted under its
14 constitutional authority, on the subject of bankruptcies are suspended."
15 *Stellwagen v. Clum*, 245 U.S. 605, 613 (1928). Whether Congress has
16 preempted state law is a matter of congressional intent, express or
17 implied. Implied preemption is inferred from surrounding circumstances
18 of the statute that Congress intended to occupy the field. This is field
19 preemption. *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F. 3d 1198, 1201
20 (9th Cir. 2005). Where Congress has not entirely displaced the state
21 regulation of a specific area, state law is nevertheless preempted to the
22 extent that it actually conflicts with federal law, including when state
23 law "stands as an obstacle to the accomplishment and execution of the
24 full purposes and objectives of Congress." This is conflict preemption.
25 *Pacific Gas and Elec Co. v. State Energy Resources Conservation &*

1 *Development Com'n*, 461 U.S. 190, 204(1983), citing *Hines v. Davidowitz*,
2 312 U.S. 52, 67 (1941).

3 In order to determine whether the Bankruptcy Code preempts the
4 operation of § 2930 in this case, the court must look at the purpose of
5 the state statute and the purpose of the Bankruptcy Code, in particular §
6 552(a). *Burkhart v. Coleman (In re Tippet)*, 542 F. 3d 684, 689 (9th Cir.
7 2008). Chapter 7 embodies two ideals: (1) giving the individual debtor
8 a fresh start, by giving her a discharge of most of her debts; and (2)
9 equitably distributing a debtor's assets among competing creditors.

10 *Sherwood Partners, Inc.*, 394 F. 3d at 1203. On February 21, 2008, Debtor
11 received her § 524 discharge which operates as an injunction against
12 commencement or continuation of an action, the employment of process, or
13 an act to collect, recover or offset any such debt as a personal
14 liability of the debtor. As such, the injunction "casts a wide shadow,
15 with a large penumbra." *Ruvacalba v. Munoz (In re Munoz)*, 287 B.R. 546,
16 553 (9th Cir. BAP 2002). Additionally, the discharge injunction applies
17 "permanently with respect to every debt that is discharged." *Garske v.*
18 *Arcadia Fin., Ltd. (In re Garske)*, 287 B.R. 537, 542 (9th Cir. BAP 2002).

19 When Debtor reacquired the Property on April 15, 2015, § 552(a) was
20 also effective, preventing a lien based on the Trust Deed from attaching
21 to the Property. In line with the general purpose of the Bankruptcy
22 Code, § 552(a) serves to facilitate a debtor's fresh start. *In re*
23 *Transportation Design and Technology, Inc.*, 48 B.R. 635 (Bankr. S.D.Cal
24 1985) ("The purpose of this provision is to facilitate a debtor's 'fresh
25 start' by enabling him or her to use after-acquired property free and
26 clear of prebankruptcy liens."). If Beveridge's junior lien is allowed
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1 to reattach, it would be contrary to the purposes of § 552 and would
2 frustrate the effect of the § 524 discharge. Therefore, § 2930 is in
3 direct conflict with the purpose of the Code and conflict preemption
4 applies.

5 Beveridge argues to the contrary, relying on cases which are easily
6 distinguishable. In *Sticken v. Applebaum (In re Applebaum)*, 422 B.R.
7 684, 693 (9th Cir. BAP 2009) the court found that California's exemption
8 statutes did not interfere with the § 522 exemption scheme and therefore
9 they were not preempted. In so ruling the BAP compared the purpose of §
10 522 with the purpose of the exemption statutes and found no conflict.
11 Both were intended to protect certain property of the debtor from
12 creditor execution or trustee liquidation to facilitate an "appropriate
13 standard of living post bankruptcy" and thereby, a fresh start. *Id.* at
14 692, citing *In re Brown*, 2007 WL 2120380 at *4-6 (Bankr. N.D.NY 2007).
15 The two statutes may coexist in harmony, so preemption is not implicated.
16 The conflict between the statutes here is blatant.¹⁵

17 Moreover, a finding that § 552(a) preempts and therefore makes
18 ineffective § 2930 is entirely consistent with this court's application
19 of the discharge injunction to preclude Beveridge from reimposing the
20 Trust Deed after the underlying debt has been forgiven. Both support the
21 right of Debtor to a fresh start, with new property unencumbered by a
22 lien based on a prepetition security agreement so that she may maintain
23 an appropriate standard of living. Implementation of § 2930 would defeat
24 that purpose.

25
26 ¹⁵Since the court finds conflict preemption, there is no purpose in
27 exploring the applicability of field preemption.
28

1 Challenging the effect of § 552(a) on theories other than federal
2 preemption, Beveridge poses that it is inapplicable here because (a) it
3 was intended only to protect personal property, not real property, and
4 (b) its protections extend only to the estate during the case, not to the
5 debtor after closing. In support of these arguments it relies on a
6 bankruptcy court decision in a chapter 12 proceeding, *In re Forrest*, 2011
7 WL 10656620 (Bankr. E.D. CA. 2011), and a Ninth Circuit decision, *Philip*
8 *Morris v. Bering Trader, Inc. (In re Bering Trader, Inc.)*, 944 F. 2d 500
9 (1991). Neither case provides applicable precedent for Beveridge's
10 arguments, and no other authorities would limit § 552 as Beveridge would
11 have it limited.

12 The court in *Forrest* was tasked to determine whether a crop
13 creditor was accorded security in the present and future crop of raisin
14 grapes or whether the parties' agreement gave it ownership rights. In
15 finding that it held security, making the limits of § 552 apply, the
16 court reviewed the legislative history where it discussed Article 9 of
17 the Uniform Commercial Code, a logical review since the dispute there was
18 over personal property rights, which does set forth a policy that §
19 552(a)'s purpose was to maximize free and clear estate property in order
20 to pay creditors the fullest amount possible. However, the court never
21 said nor implied that a similar policy would not apply to real property,
22 nor did it provide any analysis which suggests that the word "debtor"
23 should be ignored. The outcome of *Forrest* favored the debtor there and
24 it certainly does no damage to Debtor's argument here.

25 *Bering Trader* is similarly inapposite. There, the Ninth Circuit
26 discusses the exceptions in § 552(b) to determine whether rents received
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1 on real property collateral during a chapter 11 belonged to the secured
2 creditor under a subsection(b) exception or remained to benefit the
3 estate. Although the case was not about property of a debtor as opposed
4 to an estate, the analysis did not suggest it would be different if it
5 was property of the debtor and no estate administration issues were in
6 play.

7 The weakness of Beveridge's authority underscores that although
8 policy sound bites might favor an interpretation of § 552(a) that would
9 limit it to protecting an estate while a case is open, the precise words
10 of the unambiguous statute bear substantial weight. *United States v. Ron*
11 *Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). It speaks directly
12 about property of the debtor, not just the estate, and has no temporal
13 limitation to "while the case is open". Therefore, § 552(a) applies and
14 by itself, without reference to the discharge and lien extinguishment,
15 prevents the reimposition of the Trust Deed on the Property.¹⁶

16 **H. The Doctrine of Prior Exclusive Jurisdiction**

17 As discussed above, Debtor initially commenced litigation in state
18 court, seeking to restrain the nonjudicial foreclosure proceeding. In
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20 ¹⁶ In opposing the Summary Judgment motion, Beveridge argues that
21 the effect of § 2930 is to impose an entirely new involuntary lien on the
22 Property and therefore it is not "resulting from" the prepetition
23 security agreement and not subject to the § 552(a) bar. The court found
24 the argument largely unintelligible and supported by no case authority,
25 but it also dooms Beveridge to defeat. If an entirely new involuntary
26 lien springs into life in 2015 under § 2930, because of the intervening
discharge, there is no debt to support it. When this critical element is
missing, there can be no lien. This is similar to a prepetition abstract
of judgment which did not create a judicial lien because the judgment
debtor owned no real property. After the obligation manifested by the
judgment is discharged, the abstract has no effect on after-acquired
property because the underlying debt no longer exists.

1 opposing Debtor's Summary Judgment and in support of its own earlier
2 motions, Beveridge has asserted that the doctrine of prior exclusive
3 jurisdiction would deprive this court of the power to resolve this
4 dispute, compelling dismissal in favor of the still pending State Court
5 Action. If the doctrine did apply here, this court would lack
6 jurisdiction and must mandatorily abstain. *State Eng'r of State of*
7 *Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*,
8 339 F. 3d 804, 810 (9th Cir. 2003) ("Although the doctrine is based at
9 least in part on considerations of comity and prudential policies of
10 avoiding piecemeal litigation, it is no mere discretionary abstention
11 rule. Rather it is a mandatory jurisdictional limitation.").

12 Prior exclusive jurisdiction was developed in common law and has
13 been articulated as controlling federal law by the Supreme Court. It is
14 a restraint on normal jurisdictional exercise by federal courts.
15 Ordinarily, "the pendency of an action in the state court is no bar to
16 proceedings concerning the same matter in the Federal court having
17 jurisdiction." *Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 544 U.S.
18 280, 292 (2005) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).
19 However, "when one court is exercising *in rem* jurisdiction over a *res*, a
20 second court will not assume *in rem* jurisdiction over the same *res*."
21 *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). The doctrine applies in
22 both *in rem* and *quasi in rem* matters and is both a principle of comity
23 and of subject matter jurisdiction.

24 Beveridge asserts that Debtor's state court litigation is *in rem* or
25 *quasi in rem*, compelling this court to defer to it. To make such
26 determination, this court must look to the state court pleadings, as well
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1 as the status of the case during the federal proceeding. Debtor's
2 complaint stated four causes of action on very narrow terms: (1)
3 Violation of the Statutory Power of Sale; (2) Injunctive relief [sic, a
4 remedy, not a cause of action]; (3) Cancellation of Instruments,
5 specifically the Notice of Default and Notice of Trustee's Sale; and (4)
6 Declaratory Relief that the contemplated nonjudicial foreclosure was
7 invalid. Beveridge's cross complaint had one cause of action, for
8 Declaratory Relief that the Trust Deed was valid. Although she had
9 initially obtained a TRO against the foreclosure proceeding, before she
10 reopened her bankruptcy case Debtor had dropped pursuit of a preliminary
11 injunction and the foreclosure sale had already occurred. This
12 circumstance made all of the state court causes of action moot: a court
13 ruling on any of the causes of action would not undo the foreclosure
14 because there was no claim praying for that remedy. *Wilson & Wilson v.*
15 *City Council of Redwood City*, 191 Cal. App. 4th 1559, 1574, 120 Cal.
16 Rptr. 3d 665 (2011) (the pivotal question in determining if a case is
17 moot is therefore whether the court can grant the plaintiff any effectual
18 relief); *California Water & Telephone Co. v. County of Los Angeles*, 253
19 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618 (1967) (if events have made
20 such relief impracticable, the controversy has become "overripe" and is
21 therefore moot). Moreover, since all the claims were about instruments
22 rather than the underlying real property, whether the action was *in rem*
23 is questionable. It does not seem proper for this court to abstain from
24 a moot case.

25 A second, more powerful reason to not abstain exists: the scope of
26 federal jurisdiction accorded to the district and bankruptcy courts by 28

1 U.S.C. § 1334. District courts are granted exclusive jurisdiction over
2 bankruptcy cases. 28 U.S.C. § 1334(a). District courts are also granted
3 "original but not exclusive jurisdiction of all civil proceedings arising
4 under title 11, or arising in or related to cases under title 11." 28
5 U.S.C. § 1334(b). "Original jurisdiction" is a term of art referring to
6 "[a] court's power to hear and decide a matter before any other court can
7 review the matter." Bryan Garner, ed. Black's Law Dictionary, 3d Pocket
8 Ed. (2006) at 395. This original jurisdiction is vested "notwithstanding
9 any Act of Congress that confers exclusive jurisdiction on a court other
10 than the district court." *Id.* The intent of this language is to bring
11 all bankruptcy-related litigation within the purview of the district
12 court and therefore the bankruptcy court by reference. 28 U.S.C. § 151.

13 As discussed above, the critical issues to be determined rest on
14 the bankruptcy principle of discharge, as well as the scope of § 552(a),
15 and their combined impact on Beveridge's asserted lien on the Property,
16 at a minimum related-to jurisdiction. Therefore, this court has the
17 right to take the first crack - original - at deciding them. Moreover,
18 the State Court Action made no mention of these bankruptcy issues. It is
19 not as if this court was snatching away the right to rule from the state
20 court. Unless amended pleadings were allowed, it would never resolve the
21 effect of the discharge or § 552. For these powerful reasons, prior
22 exclusive jurisdiction does not deprive this court of the power to decide
23 the issues before it.

24 **I. Contempt Is Not the Exclusive Remedy**

25 Perhaps the most troubling argument asserted by Beveridge regarding
26 the adversary proceeding before the court is that Debtor's sole remedy
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1 for a violation of the discharge injunction is a contempt proceeding. It
2 posits that this court lacks subject matter jurisdiction because under
3 the prevailing authority of *Walls v. Wells Fargo Bank*, 276 F 3d 502 (9th
4 Cir. 2002) a debtor does not have a private right of action for damages
5 for violation of the discharge injunction. A civil contempt proceeding,
6 brought by motion under Rule 9014, was intended by Congress as the remedy
7 for a violation of the discharge injunction and since only the
8 legislature may speak to the manner of enforcement of a federal statute
9 (here § 524(a)), no claim for relief for such violation exists. *Id.* at
10 506-507. After all, says Beveridge and Wall, "compensatory civil
11 contempt allows an aggrieved debtor to obtain compensatory damages,
12 attorney's fees, and the offending creditor's compliance with the
13 discharge injunction. Therefore, contempt is the appropriate remedy and
14 no further remedy is necessary." *Id.* at 507.

15 In addition to Wall, Beveridge cites to *Barrientos v. Wells Fargo*
16 *Bank Nat. Ass'n*, 2009 WL 1438151 at *3 (S.D. Cal. 2009) *aff'd sub nom.*
17 *Barrientos v. Wells Fargo Bank, N.A.*, 633 F. 3d 1186 (9th Cir. 2011), and
18 *In re Frambes*, 454 B.R. 437 (Bankr. E.D. Ky. 2011) for their holdings
19 that § 105 does not create an adversary claim for relief for violation of
20 the discharge injunction; contempt is the sole remedy.

21 Although the words of Wall are precise and compelling, this court
22 finds that the limitation on the remedy¹⁷ is confined to stating a claim
23

24 ¹⁷ As noted above, this court does not recognize this argument as a
25 subject matter jurisdiction argument. The subject matter jurisdiction is
26 founded on 28 U.S.C. § 1334(b) as the basis for core jurisdiction. The
Ninth Circuit speaks of the debtor choosing the wrong "remedy" and that
is precisely what is at issue.

1 for relief precisely for discharge violation and a careful reading of the
2 cases shows they were not intended to prevent claims for quiet title or
3 declaratory relief as have been asserted in the complaint at hand.

4 First, in the cited cases which created the rule of law, the debtors
5 sought to state a claim for relief for discharge violation. And in *Wall*
6 and *Barrientos* the chosen court was not the bankruptcy court but rather
7 the district court. Both courts wished to defer to the court issuing the
8 injunction and with expertise on the subject matter, the bankruptcy court
9 through a contempt proceeding, to provide the remedy through contempt.

10 "Imposing a private remedy here could put enforcement of the discharge
11 injunction in the hands of a court that did not issue it ... which is
12 inconsistent with the present scheme that leaves enforcement to the
13 bankruptcy judge whose discharge order gave rise to the injunction.

14 *Wall*, 276 F. 3d. at 509.

15 Debtor here has not filed a complaint in district court and has not
16 pled a claim for relief of violation of the discharge; the claims here
17 are for injunctive relief, declaratory relief, determination of the
18 extent and priority of a lien, cancellation of instruments, and wrongful
19 foreclosure, all claims recognized as private rights of action under
20 federal and state law. To that end, the holdings of *Wall* do not prohibit
21 such claims. Moreover, as discussed at further length below, contempt is
22 an ineffective remedy to "right the wrong" which occurred when Beveridge
23 reimposed the Trust Deed and foreclosed. This court cannot find
24 Beveridge in contempt for that wrong because it did not possess the
25 necessary subjective knowledge that the discharge injunction applied to
26 its acts.

1 Acts which violate the discharge injunction are void ab initio. In
2 re *Gurrola*, 328 B.R. at 175. Reimposing the Trust Deed is a void act.
3 The subsequent foreclosure is void. The contemplated Unlawful Detainer
4 would be void if carried out. Yet, if this court follows blindly the
5 articulated dictate of *Wall* and instructs that the only remedy for Debtor
6 is contempt, Debtor effectively has no remedy. Could the Ninth Circuit
7 have intended this result, preventing Debtor from using commonly accepted
8 and pled claims for relief to give Debtor clean title, unencumbered by a
9 void Trustee's Deed upon Sale? Beveridge would have it be. This court
10 cannot accept that as the intended outcome and rules that these remedies
11 are available to Debtor.¹⁸

12 **J. Disposition of Claims for Relief**

13 The court described the claims for relief set forth in the First
14 Amended Complaint in Part A above and opined that a ruling for Debtor on
15 one would compel a similar ruling on the others. However, the relief
16 sought in these claims is largely duplicative; in particular, the third
17 claim for determination of extent and validity of lien, the fourth claim
18 for cancellation of recorded documents, and the fifth claim for wrongful
19 foreclosure are duplicative of the declaratory relief available under
20 claim two. For that reason, in granting Summary Judgment for Debtor, the
21 court will enter Judgment for Debtor on the first and second claims for
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24 ¹⁸ Even the Ninth Circuit has ignored its own limited remedy
25 mandate. The contempt issue addressed in *Zilog*, discussed below, came
26 after summary judgment in an adversary proceeding. In reversing the
district court and bankruptcy court, Judge Kozinski did not say a word
about the adversary proceeding being the improper remedy.

1 relief and will dismiss the third, fourth and fifth claims as duplicative
2 and unnecessary without prejudice.

3
4 **II. ANALYSIS OF THE CONTEMPT PROCEEDING**

5
6 **A. Relief Sought**

7 As described in the Factual and Procedural Background, there are
8 two aspects to the contempt proceedings. Debtor first asserted only that
9 the Request for Entry of Default in the State Court Action by Beveridge,
10 which included a reference to an attorney's fee award, was a violation of
11 the discharge injunction because Debtor's personal liability for
12 attorney's fees based on a clause in the prepetition Trust Deed was
13 discharged. At this court's prodding, Debtor then supplemented its
14 request to argue that all actions taken by Beveridge pertaining to the
15 Trust Deed after Debtor reacquired title to the Property were a discharge
16 violation because the Trust Deed was extinguished and by the time an
17 attempt to revive it occurred, the underlying debt had been discharged.
18 The court will address them separately.

19 **B. Reimposition of Trust Deed and Subsequent Acts**

20 The court has found that the reimposition of the Trust Deed and
21 subsequent acts were a violation of the discharge injunction and
22 therefore void. The question here is a simple one: is Beveridge in
23 contempt because it took those acts?

24 The Ninth Circuit has set a high bar to find contempt for violating
25 the discharge injunction. In a series of cases, *Renwick v. Bennett (In*
26 *re Bennett)*, 298 F. 3d 1059, 1069 (9th Cir. 2002), *Walls v. Wells Fargo*

1 *Bank, N.A.*, 276 F. 3d 502, 507 (9th Cir. 2002), *Knupfer v. Lindblade (In*
2 *re Dyer)*, 322 F. 3d 1178 (9th Cir. 2003), and *Zilog, Inc. v. Corning (In*
3 *re Zilog, Inc.)*, 450 F. 3d 996, 1007-8 (9th Cir. 2006) the court honed
4 the requirements for a finding of contempt. *Bennett* and *Walls* held that
5 a person who knowingly violates the discharge injunction can be held in
6 contempt under § 105(a) of the Bankruptcy Code. *Bennett* cited with
7 approval the standard adopted by the Eleventh Circuit for violation of
8 the discharge injunction in *Hardy v. United State (In re Hardy)*, 97 F. 3d
9 1384, 1390 (11th Cir. 1996): "[T]he movant must prove that the creditor
10 (1) knew the discharge injunction was applicable and (2) intended the
11 actions which violated the injunction." *Bennett*, 298 F. 3d at 1069.

12 Notwithstanding the *Bennett* definition, the level of proof remained
13 uncertain. Consequently, in *Dyer*, the court compared the level of
14 knowledge necessary for an award of damages under § 362(h) (now (k)) with
15 that necessary for such award for contemptuous violation of the discharge
16 violation. Recognizing the higher standard for contempt, the court
17 wrote: "we hesitate[d] to extend that principle to the contempt context.
18 Generally, a party cannot be held in contempt for violating an injunction
19 absent knowledge of that injunction." *Dyer*, 322 F. 3d at 1191-92.

20 Despite this prior case law, the court in *Zilog* found itself
21 considering a case where the bankruptcy court, without the benefit of an
22 evidentiary hearing, had found defendants in contempt, stating in its
23 oral ruling such things as "contempt need not be willful to justify an
24 award of damages" and "[c]ontempt may be established even if the failure
25 to comply with the Court order was unintentional." The bankruptcy court
26 was also under the misimpression that knowledge could be presumed. *In re*
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1 *Zilog, Inc.*, 450 F. 3d at 1007-1008. As a consequence, the Ninth Circuit
2 made a definitive statement to clarify the finding necessary for contempt
3 for violation of the discharge injunction: the movant must establish by
4 clear and convincing evidence that the contemnee was aware of the
5 discharge injunction and that it applied to its claims. *Id.* at 1009-
6 1010. The standard set is a subjective standard, which differs from the
7 objective standard necessary for a stay violation.

8 That leads this court to consider whether Beveridge knew the
9 discharge injunction applied to its actions to reimpose the Trust Deed,
10 foreclose, and pursue unlawful detainer. The answer would be "no".
11 Beveridge did not have the proper level of subjective knowledge and
12 therefore could not be found in contempt.

13 The facts here are strikingly similar on material elements to those
14 in *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275 (9th Cir. BAP 2016).¹⁹
15 In that case, debtor Taggart was a member of SPBC LLC, of which Mr.
16 Emmert and Mr. Jehnke were also members. Before his bankruptcy, Taggart
17 had transferred his membership interest to another LLC and eventually to
18 his attorney, Mr. Berman, in violation of the operating agreement which
19 granted the members a right of first refusal before any membership
20 interest could be transferred. SPBC sued Taggart and Mr. Berman in state
21 court to undo the transfer and for damages. Taggart and Berman answered
22 and counterclaimed against Mr. Emmert, Mr. Jehnke, and SPBC for
23 attorneys' fees. After the intervening bankruptcy, SPBC resumed the
24

25 ¹⁹ This court has significant knowledge of the *Taggart* case, as lead
26 author of the BAP opinion.

1 state court litigation but dropped the request for damages because of the
2 discharge. The state court ruled in favor of SPBC and unwound the
3 transfers.

4 Subsequent to this victory, Mr. Emmert, Mr. Jehnke, and SPBC
5 (collectively SPBC) filed a petition in state court seeking attorneys'
6 fees for the period after Taggart's discharge, at the same time seeking a
7 ruling from the state court on whether the discharge injunction applied
8 to the post-discharge fee request, asserting that Taggart had "returned
9 to the fray" under the holding in *Boeing North American, Inc. v. Ybarra*
10 (*In re Ybarra*), 424 F. 3d 1018 (9th Cir. 2005). The state court
11 eventually ruled that the fees were not discharged and awarded fees to
12 SPBC. Meanwhile, Taggart had reopened his bankruptcy case, seeking a
13 similar *Ybarra* decision from that court. The bankruptcy judge agreed
14 with the state court that Taggart had "returned to the fray" and that the
15 discharge injunction did not apply to the fee award. The state court
16 then entered judgment for the fees against Taggart.

17 Taggart appealed the bankruptcy court decision to the district
18 court, which reversed, finding he did not return to the fray, and
19 remanded to the bankruptcy court to determine whether SPBC had violated
20 the discharge injunction. Now told that Taggart did not return to the
21 fray, the bankruptcy judge applied the objective test of the Eleventh
22 Circuit in *Hardy* with regard to whether SPBC knew the discharge was
23 applicable and awarded sanctions against SPBC. This time SPBC appealed
24 to the Ninth Circuit BAP, which reversed, ruling that under the *Zilog*
25 subjective standard SPBC could not have known the discharge injunction
26 applied to them at the relevant times of the alleged violative acts.

1 After all, it took an appellate ruling from the district court before
2 there was a determination the discharge injunction did apply to the
3 postpetition fees and SPBC could not have known it applied to them before
4 that time, believing from the prior court rulings that the injunction was
5 inapplicable to them. *In re Taggart*, 548 B.R. at 291.

6 Here, Beveridge believed it was entitled under § 2930 and
7 California case law to revivify its Trust Deed notwithstanding the
8 intervening bankruptcy discharge of Debtor. Only this court's ruling -
9 and eventually an appellate affirmance of that ruling if this court is
10 upheld - will give Beveridge the subjective knowledge that the discharge
11 injunction applied to its acts. Like in *Taggart*, There is no clear and
12 convincing evidence that at the time it acted to enforce the Trust Deed,
13 Beveridge knew such acts violated the injunction. This court cannot find
14 Beveridge in contempt for those activities because the *Zilog* test has not
15 been met.

16 **C. Request to Enter Default on State Court Cross Complaint**

17 Beveridge's November 6, 2017 filing of a Request for Entry of
18 Default presents a different circumstance on the knowledge issue, as well
19 as raising a distinct legal issue regarding the scope of the in personam
20 discharge. Prior to November 2017 this court had issued a preliminary
21 injunction rooted in its finding that the reimposition of the Trust Deed
22 was a violation of the discharge injunction. Since the Cross Complaint
23 sought a declaration that the Trust Deed and subsequent foreclosure
24 proceeding were valid, the relief sought was 100% counter to this court's
25 ruling. On that issue, there is sufficient clear and convincing evidence
26 that Beveridge knew the discharge injunction applied to its acts when
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1 taken and therefore was in contempt of that injunction when it sought a
2 contrary entry of default.

3 The lesson of *Taggart*, however, is that it's not over until it's
4 over. Unless and until an appellate court makes a final ruling that this
5 court has it right, maybe Beveridge does lack the necessary subjective
6 belief that the injunction applies to it. After all, if the Summary
7 Judgment is reversed, the Trust Deed is valid and a default judgment on
8 the Cross Complaint would not violate anything. After the appeal is
9 completed - and only at that time - would it be appropriate for a court
10 to determine whether Debtor, by filing the State Court Action in an
11 attempt to stop the foreclosure, had "returned to the fray" under the
12 *Ybarra* standard.²⁰

13 Based on this procedural posture, the court will stay any decision
14 on this second prong of the contempt action until a final appellate
15 ruling is made in this case.²¹

17 CONCLUSION

18 For the foregoing reasons, the court grants Summary Judgment for
19 Debtor and denies the cross motion of Beveridge. Along with this
20

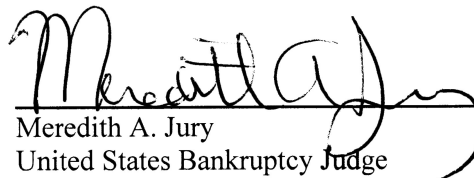
21 ²⁰ In pure, unadulterated dicta, this court doubts it would find
22 such a return to the fray where Debtor's acts were an attempt to halt
23 postpetition activity by Beveridge that could result in her losing her
24 house, a far cry from debtor Ybarra returning to state court post
25 discharge to litigate and lose a prepetition wrongful termination claim
26 for damages.

27 ²¹ At the hearing on the Summary Judgment, Beveridge stated it would
28 not pursue the default any further until the appeal is final. The
court's intended stay order pending appeal will also maintain the status
quo in that case.

Memorandum, it will enter a Statement of Uncontroverted Facts and
Conclusions of Law to support the Summary Judgment, an Order Granting
Summary Judgment to Debtor and Denying Summary Judgment to Beveridge, and
the Summary Judgment. After entry of these documents, as promised, the
court will schedule a telephonic conference to discuss the scope of the
stay pending appeal.

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Date: February 9, 2018


Meredith A. Jury
United States Bankruptcy Judge